

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE OPTICAL DISK DRIVE ANTITRUST
LITIGATION

CASE NO. 3:10-md-2143 RS

ACER INC.; ACER AMERICA
CORPORATION; GATEWAY, INC.; AND
GATEWAY U.S. RETAIL, INC., F/K/A
EMACHINES, INC.,

CASE NO. 3:13-cv-04991-RS

Plaintiffs,

v.

LITE-ON IT CORPORATION, et al.

Defendants.

**ORDER DENYING JOINT MOTION TO
DISMISS AND GRANTING
PANASONIC'S MOTION TO DISMISS
WITH LEAVE TO AMEND**

I. INTRODUCTION

This action was brought by Acer, Inc., a Taiwan-based company, and three of its United States subsidiaries, Acer America Corporation; Gateway, Inc.; Gateway U.S. Retail, Inc., f/k/a Emachines, Inc. The Taiwan parent, Acer, Inc., has since dismissed its claims, leaving only the U.S. subsidiaries as plaintiffs.

1 This particular action is part of a Multi District Litigation matter centered around two
2 consolidated class action complaints brought on behalf of “direct” and “indirect” purchasers of
3 optical disk drives—the above-captioned *In re Optical Disk Drive Antitrust Litigation*, Case No.
4 3:10-md-2143 RS. While plaintiffs here have elected to proceed separately, rather than as part of
5 the putative classes, their complaint alleges substantially the same facts regarding the purported
6 existence of an industry-wide conspiracy to fix the prices of Optical Disk Drives.

7 All defendants join in a motion to dismiss brought on various grounds. Defendants Pioneer
8 Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity
9 Taiwan Co., Ltd., and Pioneer Digital Design & Manufacturing Company (collectively “Pioneer”)
10 also move separately to dismiss based on their further contention that the complaint lacks sufficient
11 facts showing that Pioneer participated in any conspiracy. Pursuant to Civil Local Rule 7-1(b), the
12 motions have been submitted without oral argument. The joint motion will be denied, and Pioneer’s
13 motion will be granted, with leave to amend.

14 II. LEGAL STANDARD

15 Dismissal under Rule 12(b)(6) is proper if the complaint lacks a “cognizable legal theory” or
16 “sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901
17 F.2d 696, 699 (9th Cir. 1990). A plaintiff must allege “enough facts to state a claim to relief that is
18 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court need not
19 accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or
20 unreasonable inferences.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

21 Under Rule 12(b)(1), dismissal is appropriate if the complaint “fails to allege facts sufficient
22 to establish subject matter jurisdiction.” *In re Dynamic Random Access Memory (DRAM) Antitrust*
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1 *Litigation*, 546 F.3d 981, 984-85 (9th Cir. 2008). “The party asserting jurisdiction bears the burden
 2 of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter
 3 jurisdiction.” *Id.* at 984. One prong of the joint motion to dismiss contends that some of the alleged
 4 claims are barred by operation of the Foreign Trade Antitrust Improvement Act of 1982 (“FTAIA”).
 5 There has been some uncertainty as to whether such arguments should be seen as jurisdictional,
 6 such that Rule 12(b)(1) applies, or as going to the questions of whether the plaintiff has stated a
 7 claim, such that Rule 12(b)(6) applies. *See In re DRAM*, 546 F.3d at 985 n.3. Relying on note 3 of
 8 *In re Dram*, however, defendants suggest that, in this instance, the analysis and the result is the same
 9 under either framework, a proposition plaintiffs do not challenge.¹

10 11 III. DISCUSSION

12 A. FTAIA

13 The FTAIA amended the Sherman Act to establish a general rule that federal antitrust law
 14 “shall not apply to conduct involving trade or commerce (other than import trade or import
 15 commerce) with foreign nations—unless” the domestic effect exception applies. *In re DRAM*, 546
 16 F.3d at 985. That exception involves a two prong test as to whether the alleged antitrust conduct
 17 “(1) has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce, and (2)
 18 ‘such effect gives rise to a [Sherman Act] claim.’ *Id.* (quoting *F. Hoffmann–La Roche Ltd. v.*
 19 *Empagran S.A.*, 542 U.S. 155, 159 (2004)).

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23 ¹ In a decision issued today, the Ninth Circuit has clarified that the FTAIA “is not a subject-matter
 24 jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman
 25 Act claim involving nonimport trade or commerce with foreign nations.” *United States v. Hsiung*,
 26 No. 12-10492, slip op. at 26 (9th Cir. July 10, 2014).

1 Defendants' moving papers place primary emphasis on demonstrating that the claims
2 brought by Acer, Inc. fail in light of the FTAIA, because it is a foreign entity that *only* made ODD
3 purchases overseas. While Acer, Inc.'s subsequent dismissal of its claims is not necessarily a
4 concession that defendants' arguments were all unassailable, and would not be strictly binding on
5 the remaining plaintiffs in any event, it plainly reflects a recognition that mere allegations of a
6 global conspiracy and ODDs eventually entering the domestic market are not sufficient to support
7 claims based on overseas transactions.

8 The remaining plaintiffs, however, are in a substantially different position from that of Acer,
9 Inc. Each plaintiff alleges that it made ODD purchases pursuant to negotiations that took place in
10 California, with purchase orders issued in California, and where they took possession of the ODDs
11 in California. Acer America is alleged only to have made purchases from defendants "indirectly";
12 Gateway and eMachines allegedly purchased from defendants both "directly and indirectly."

13 Defendants do not dispute that the remaining plaintiffs have thereby alleged at least some
14 purchases of ODDs that do not implicate FTAIA, presumably because such transactions took place
15 domestically, or constitute "import trade" excluded from the scope of the statute, or fall within the
16 domestic effect exception. Defendants nevertheless urge dismissal of the direct purchaser claims of
17 Gateway and eMachines "[t]o the extent" they are "based on the non-import direct purchase of
18 ODDs outside the United States." Defendants similarly seek dismissal of the indirect purchaser
19 claims of all three plaintiffs, "to the extent" they are based on ODD transactions where the
20 underlying "direct" purchase was made outside the United States.

21 In so characterizing the relief requested by the motion, defendants are effectively seeking
22 two rulings: (1) that at least some of the damages plaintiffs are seeking arise from ODD
23 transactions that do not qualify as "import trade," and (2) that those transactions do not fall within
24 the domestic effect exception. Defendants' assumption that plaintiffs are seeking to recover for
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1 transactions not constituting “import trade” appears to be based on their argument that the products
2 at issue must be imported into the United States *by the defendants*, not by third parties or the
3 plaintiffs. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2010 WL 2610641, at *5 (N.D. Cal.
4 June 28, 2010) (“[T]he dispositive inquiry is whether the conduct of the defendants, not plaintiffs,
5 involves ‘import trade or commerce’” (quoting *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293,
6 303 (3d Cir. 2002))). While that may very well be true, there is no basis to conclude at this stage that
7 plaintiffs are seeking recovery for transactions that will not qualify as import trade. As noted,
8 plaintiffs have expressly alleged that they “took possession” of the ODDs in California. That
9 allegation is consistent with a state of facts in which defendants were the importers, or at least
10 sufficiently involved in the importation, for the exclusion to apply. *See id.* at *4 (“A number of
11 courts have held that the FTAIA’s ‘import commerce’ exclusion applies only where the defendants
12 are *directly involved* in the importation of goods or services into the United States.” (emphasis
13 added)). While plaintiffs will ultimately be required to prove that all of the non-domestic
14 transactions for which they seek damages constitute import trade (or fall within the domestic effect
15 exception), defendants have not shown how the complaint fails to state a claim, merely because they
16 believe plaintiffs may be hoping to recover for some transactions that do not, in defendants’ view,
17 meet the requirements for import trade.

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19 Defendants may also be correct that in an appropriate case, the availability of the import
20 trade exclusion can be decided at the pleading stage. Thus, for example, the *TFT-LCD* decision
21 cited above found that Motorola could not avail itself of the exclusion where it had expressly
22 alleged that it and its affiliates, not the defendants, had imported the allegedly price-fixed products
23 into this country. *See id.* at *3. Where plaintiffs have made no allegations demonstrating they are
24 seeking to apply the exclusion in a manner not legally supportable, however, there is nothing to
25 dismiss at the pleading stage. Thus, while it is inarguable that plaintiffs may not recover for claims
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1 based on “non-import” overseas ODD purchases (absent applicability of the domestic effect
2 exception), there is no basis to conclude at this juncture that the complaint impermissibly seeks to
3 do so.

4 Even assuming, however, that plaintiffs may be hoping to recover for some “non-import”
5 foreign purchases, there similarly are no grounds to conclude at this stage that they will be unable to
6 prove applicability of the domestic effect exception, or to require the pleading of additional facts to
7 support that exception. Again, defendants are effectively going beyond the pleadings to hypothesize
8 kinds of transactions that might not fall within the exception. When defendants’ motion was
9 primarily directed at Acer, Inc., they could reasonably argue that overseas sales to an overseas entity
10 would not fall within the exception under any plausible scenario, and that dismissal at the pleading
11 stage was therefore appropriate. Given the remaining plaintiffs’ status as domestic entities doing
12 business in this country, however, that argument is substantially less compelling. As there also is no
13 dispute that the complaint states a claim, it would be unwarranted to attempt to evaluate the
14 potential applicability of the exception to circumstances that have not even been alleged. *See also*
15 *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2010 WL 5477313 (N.D.Cal.
16 December 31, 2010) (declining to decide some aspects of availability of domestic effect exception
17 on motion to dismiss, and reserving the issue for evidentiary hearing). Accordingly, to the extent
18 the motion to dismiss is based on the FTAIA, it is denied.²

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21 ² Almost in passing, defendants point out that Acer America’s *federal* claims are barred by the
22 “bright line” rule of *Illinois Brick* that indirect purchasers cannot recover. Plaintiffs do not contest
23 that point, and it shall therefore be deemed that the complaint does not seek recovery under federal
24 law for indirect purchases by any of the remaining plaintiffs. Plaintiffs’ further argument that their
25 state law claims would survive even if the FTAIA bars any part of their federal claims is not
compelling. *See SRAM*, 2010 WL 5477313, at *4 (rejecting the argument that “the FTAIA does not
apply to ... state law claims” as “unpersuasive”). In light of the conclusion above, however, that
point need not be decided here.

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2 B. Antitrust Injury

3 Defendants' contention that plaintiffs have failed adequately to allege antitrust injury echoes
4 arguments previously made in connection with the class actions. Defendants continue to attempt to
5 cabin the scope of the alleged conspiracy as one in which the wrongdoing was directed exclusively,
6 or nearly so, at HP and Dell. It may very well be that plaintiffs in all of these actions will ultimately
7 be unable to persuade a trier of fact that a broader conspiracy, with resulting broad injuries, took
8 place. For purposes of pleading, however, the complaint in this action, like those in the class
9 actions, sufficiently alleges antitrust injury.
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11 C. Statute of Limitations

12 While defendants suggest that the statute of limitations may have begun to run as early as
13 March of 2009, when the last purported misconduct is alleged to have taken place, there is no basis
14 to depart from the prior determination that equitable tolling may apply. Defendants tacitly
15 recognize as much, and focus instead on arguing that the statute began to run no later than October
16 23, 2009, when, as alleged in the complaint, Sony Corporation filed a Form 6-K with the Securities
17 & Exchange Commission" in which it disclosed that Sony Optiarc America Inc. had "received a
18 subpoena from the U.S. Department of Justice (DOJ) Antitrust Division seeking information about
19 its optical disk drive business" and that "the DOJ and agencies outside the United States are
20 investigating competition in optical disk drives."

21 While the SEC filing is alleged on the face of the complaint, defendants have not shown as a
22 matter of law that it was sufficient to put plaintiffs on notice of their claims. Plaintiffs' allegation
23 that they did not have actual or constructive notice of the claims until at least three days later, when
24 the Department of Justice first made a public announcement about its investigation into the ODD
25 industry, is sufficient to preclude dismissal at the pleading stage on statute of limitations grounds, as
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1 the complaint was filed within four years of that time. The joint motion to dismiss is therefore
2 denied.

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4 D. Pioneer's motion

5 While Pioneer joined in the motion discussed above, it also filed a separate motion to
6 dismiss contending the complaint contains virtually no factual allegations to show it ever joined or
7 participated in the alleged conspiracy. It is true, as plaintiffs respond, that they need not "plead
8 each defendant's involvement in the alleged conspiracy in elaborate detail." *In re TFT-LCD (Flat*
9 *Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008). Nevertheless, they must at
10 least, "include allegations specific to each defendant alleging that defendant's role in the alleged
11 conspiracy," *id.*, and must "make allegations that plausibly suggest that each Defendant participated
12 in the conspiracy." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1019
13 (N.D. Cal. 2010). The sparse and conclusory allegations regarding Pioneer in the complaint do not
14 presently meet that standard.

15 Plaintiffs contend, however, that ongoing discovery subsequent to the filing of the
16 complaint has revealed additional, unpleaded, facts regarding Pioneer's involvement in the alleged
17 conspiracy. Without opining whether those further facts necessarily will be adequate, plaintiffs will
18 be given leave to amend.

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21 IV. CONCLUSION

22 Defendants' joint motion to dismiss is denied. Pioneer's motion to dismiss is granted.
23 Plaintiffs may file an amended complaint to allege additional facts regarding Pioneer within 20 days
24 of the date of this order. The parties should meet and confer regarding a due date for the remaining
25 defendants' answers, and either agree that they may wait until the amended complaint is filed to
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1 answer, or agree that answers to the existing complaint will be deemed applicable to the complaint
2 after it is amended with respect to the allegations against Pioneer.

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4 IT IS SO ORDERED.

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6 Dated: 7/10/14

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8 RICHARD SEEBORG
9 UNITED STATES DISTRICT JUDGE
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